

<https://helda.helsinki.fi>

Are Cooperative Societies Transforming into Cooperative Companies? : Reflections on the Finnish Cooperatives Act

Pönkä, Ilkka Hannu Ville

2019-02-06

Pönkä , I H V 2019 , ' Are Cooperative Societies Transforming into Cooperative Companies? Reflections on the Finnish Cooperatives Act ' , European Business Law Review , vol. 30 , no. 1 , EULR2019003 , pp. 77-99 .

<http://hdl.handle.net/10138/302085>

cc_by_nc_sa
publishedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

Are Cooperative Societies Transforming into Cooperative Companies? Reflections on the Finnish Cooperatives Act

VILLE PÖNKÄ*

Abstract

This article examines the so-called companization of cooperative law. Companization refers to the phenomenon of national cooperative laws adopting elements of efficiency-oriented company legislation; i.e., cooperative societies seem to be slowly transforming into cooperative companies. Companization is a widely recognized issue, but there is little research on the topic. This is unfortunate, since studying companization helps us understand the relationship between cooperative law and company law, and, furthermore, it serves as a gateway to the investigation of the essential nature of cooperatives and why we need them.

This article examines the companization of cooperative law using the Finnish Cooperatives Act (FCA) as a framework for analysis. The FCA is a good instrument for elaborating what companization means in practice, since cooperatives play a larger role in the Finnish economy than anywhere else in the world and since companization has been the conscious objective of Finnish legislators. This research was conducted by reflecting on the FCA in relation to the international cooperative law doctrine, using the ICA's cooperative principles as a benchmark. The findings reveal many signs of companization, and this does not only concern Finland: Companization is a global trend which requires further attention.

1. Introduction

Globalization has without doubt a significant impact on all economic enterprises, from private entrepreneurs to business organizations such as companies and cooperatives. It has, however, been argued that the globalization of production favors 'highly mobile,' capital-based companies and works to the disadvantage of person-based entities like cooperatives.¹ In fact, in the late 1990s Henry Hansmann already predicted that traditional cooperatives would lose the competition against other business entities, especially companies.² This prediction was based on the assumption that cooperatives are less adaptable than companies to changes in the business environ-

* LL.D., Adjunct Professor of Civil Law and Commercial Law, University of Helsinki, Faculty of Law.

¹ Hagen Henry, *Guidelines for Cooperative Legislation*, 16-17 (3rd ed., Geneva; ILO, 2012).

² Henry Hansmann, *Osuustoimintayritykset teoriassa ja käytännössä* 3 Kansantaloudellinen aikakauskirja 483 (1999).

ment.³ Moreover, as Bengt Holmström has claimed, significant changes in the economic environment are compromising the foundations of traditional cooperatives, since the interests of their members are diverging.⁴ Today, it is perhaps even possible to argue that the classical cooperative business model is facing an ideological crisis (or challenge)⁵, since the expectations of modern capital markets are not concordant with the social dimensions of the cooperative movement. It is important to understand that the growing internationalization of cooperatives – which is an inevitable result of globalization – is not occurring through international cooperation, but through foreign direct investment, i.e., through investment which the cooperative movement has traditionally resented.⁶

In company law theory, the modern shareholder-oriented ‘company’ or ‘corporation’ is often praised – at least in terms of efficiency – as the ultimate form of association.⁷ It is also widely acknowledged that national company laws are – at least to some extent – converging towards a homogenous ‘Delawarean’ model, which is considered superior in terms of competitiveness and flexibility, i.e., which is believed to be the most attractive legal framework for firms aiming for profit maximization.⁸ This

³ Some authors, however, claim that in times of (economic) crisis cooperatives can be more resilient than investor-owned enterprises, i.e., companies. See, e.g., Carlo Borzaga & Giulia Galera, *Promoting the Understanding of Cooperatives for a Better World. Euricse's Contribution to the International Year of Cooperatives*, 7-8 and 10 (University of Trento; Euricse, 2012) and Johnston Birchall & Lou Hammond Ketilson, *Resilience of the Cooperative Business Model in Times of Crisis*, 13-14 (Geneva; ILO, 2009).

⁴ Bengt Holmström, *Osuuskuntien tulevaisuus yritysmailman murroksen valossa* 3 Kansantaloudellinen aikakauskirja 500 (1999).

⁵ See, e.g., Ian MacPherson, *What Difference does a Century Make? Considering Some Crises in the International Cooperative Movement, 1900 and 2000*, 017/11 Euricse Working Paper 11 (2010) <http://www.euricse.eu/wp-content/uploads/2015/03/1304355382_n1714.pdf> (accessed 23 October 2018), who cites the main ‘ideological challenges’ of the cooperative movement as being the need to establish more clearly (1) the distinct qualities that separate cooperatives from other organizations, (2) the different roles they can play within society and in the economy and (3) the factors that make for successful cooperation.

⁶ Anjel Mari Errasti, Iñaki Heras, Baleren Bakaikoa & Pilar Elgoibar, *The Internationalisation of Cooperatives: The Case of the Mondragon Cooperative Corporation* 74 *Annals of Public and Cooperative Economics* 4, 555 (2003).

⁷ See, e.g., Stephen M Bainbridge, *Corporation Law and Economics*, 2 (New York; Foundation Press, 2002) and Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law* 89 *Geo. L.J.* 439 (2000-2001). Michael C Jensen has even claimed that ‘[w]hile cooperatives arise and persist in societies characterized by freedom of choice in organizational form, they have never been a significant factor in the economic scene.’ Michael C Jensen, *A Theory of the Firm. Governance, Residual Claims, and Organizational Forms*, 198 (Cambridge, Massachusetts; HUP, 2000).

⁸ In company law theory, such legal convergence is often understood as ‘regulatory competition.’ Although regulatory competition is usually associated with the phenomenon of U.S. states competing with one another for the most business-attractive legislation, similar competition between the EU Member States has also occurred. Within the EU regime, such competition in company law has been enabled by the decisions of the European Court of Justice. This race to the bottom/top has, however, not been as rigorous as the ongoing regulatory competition in the U.S. See, e.g., John Armour, Henry Hansmann, Reiner Kraakman & Mariana Pargendler, *What is Corporate Law?* in Reiner Kraakman et al., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, 21-22 (3rd ed., Oxford;

phenomenon does not concern only companies; hence, there are signs that also national cooperative laws are adopting elements of efficiency-oriented company legislation. In certain countries, such as Finland, it even seems that some large cooperatives are beginning to resemble listed companies. This trend, which Hagen Henry calls the ‘companization’ of cooperatives,⁹ has both positive and negative implications. On one hand, it allows cooperatives to become/remain competitive in markets dominated by stock companies. On the other hand, companization eventually reduces the types of enterprise to one model and weakens the capacity of cooperatives to facilitate sustainable development.¹⁰ Companization may also lead to a situation where cooperatives begin losing their cooperative identity, i.e., where participation is no longer personal and activity-related but based on capital contributions and ownership rights.¹¹

The system of sources of cooperative law is extremely complex, and there are several distinct models of cooperative legislation.¹² Consequently it is difficult, on a transnational level, to investigate the extent to which national cooperative laws have converged towards company laws and reveal the actual consequences of the phenomenon Henry calls companization. In order to produce concrete and reliable research findings, it might, in fact, be appropriate to approach the extent and effects of companization from a micro perspective, i.e., from a national perspective.¹³ Such research is crucial for transnational comparative studies on the topic, since, without national reflections, the analysis of companization tends to remain on a rather vague and abstract level.¹⁴

In this article, the research question “are cooperative societies transforming into cooperative companies?” is approached using the Finnish Cooperatives Act 421/2013

OUP, 2017) and Beate Sjøfjell, *Towards a Sustainable European Company Law. A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case*, 156-157 and 258-262 (Alphen aan den Rijn; Kluwer Law International, 2009).

⁹ Henry (n 1) at 5 and 10-16. Sometimes scholars use terms such as the ‘hybridization’ and ‘degeneration’ of the cooperative model instead of companization. Antonio Fici, *Cooperative Identity and the Law* 24 *European Business Law Review* 1, 38-39 (2013). These terms, however, refer to the same phenomenon. The beginning of the companization phenomenon dates back as far as to the early 1970s. Hagen Henry, *Co-operative Principles and Co-operative Law Arcross the Globe* in Jonathan Michie, Joseph R Blasi & Carlo Borzaga (eds), *The Oxford Handbook of Mutual, Co-operative and Co-owned Business*, 40 (New York; OUP, 2017) and Hans-H Münkner, *Co-operative Principles and Co-operative Law*, 34 (2nd ed., Zürich; LIT Verlag, 2015).

¹⁰ Henry (n 1) at 20 and 31.

¹¹ Tore Fjortoft & Ole Gjems-Onstad, *Cooperative Law in Norway – Time for Codification?* 45 *Scan Stud Law* 123-124 (2003).

¹² See, e.g., Antonio Fici, *An Introduction to Cooperative Law* in Dante Carcogna, Antonio Fici & Hagen Henry (eds), *International Handbook of Cooperative Law*, 10-12 (Berlin; Springer, 2013) and Borzaga & Galera (n 3) at 14.

¹³ See, e.g., Ville Pönkä, *The Convergence of Law: The Finnish Limited Liability Companies Act as an Example of the So-Called ‘Americanization’ of European Company Law* 14 *European Company Law* 1, 22 (2017), where the convergence of company law has been analyzed utilizing a similar perspective.

¹⁴ See also Fici (n 9) 64, who emphasizes the need to study the matter of uniformity and diversity in cooperative law.

(FCA) as an example. Finnish cooperative legislation offers an interesting framework for analysis for several reasons:

First, cooperatives play a significant role in Finnish society. According to statistics produced by the Pellervo Society (a service organization for Finnish cooperatives and a forum for cooperative activities), Finnish cooperatives had a total of ca. 7 million members in 2015, which means, given the size of the Finnish population (ca. 5.5 million), Finland has the highest per capita number of cooperative memberships in the world.¹⁵ It is also worth noting that several Finnish cooperatives are relatively large in terms of revenue, and many of them were listed in the International Co-operative Alliance's (ICA) Global300 Report 2010.¹⁶ Furthermore, Finnish cooperatives operate in most business sectors, including banking and insurance, agriculture and forestry and retail and consumer sales. This means that the cooperative movement is not limited to certain fields of business but is widely recognized as an alternative to the company form.

Second, the FCA is a modern law, and its preparatory works explicitly state that cooperative legislation should resemble, as much as possible, company legislation (and especially the Finnish Companies Act 624/2006).¹⁷ Therefore, it is logical to assume that Finnish cooperative law has converged towards company law. Moreover, the FCA deals exclusively with cooperatives, which makes it rather unique on a global level, since most jurisdictions do not view cooperative law as a wholly independent body of law.¹⁸

Finally, there appears to be a growing interest amongst Finnish scholars in cooperative research work and international research cooperation.¹⁹ Recent studies also indicate that Finnish scholars have been relatively active in the field of cooperative studies for some time,²⁰ although, research in the field of cooperative law stands as an exception here.²¹ Nevertheless, the situation regarding cooperative law research

¹⁵ Iiro Jussila, Panu Kalmi & Eliisa Troberg, *Selvitys osuustoimintatutkimuksesta maailmalla ja Suomessa*, 4 (Rauma; Painorauma Oy, 2008).

¹⁶ These cooperatives include SOK Corporation (place 27), Metsäliitto (place 37), OP Bank Group (place 45), Ilmarinen (place 68), Tapiola Group (place 91), Valio Group (place 126), HOK Elanto (place 154), Tradeka (place 158), Tapiola (place 160) and Atria Group (place 165). See also Borzaga & Galera (n 3) 8-13 and Chiara Carini & Maurizio Carpitia, *Are Co-operatives Small? Evidence from the World Co-operative Monitor* in Jonathan Michie, Joseph R Blasi & Carlo Borzaga (eds), *The Oxford Handbook of Mutual, Co-operative and Co-owned Business* (New York; OUP, 2017), who have illustrated the size of the cooperative sector as well as the economic and social impacts of cooperatives on a global scale.

¹⁷ Hallituksen esitys 185/2012 Eduskunnalle osuuskuntalaiksi ja eräiksi siihen liittyviksi laeiksi 19 (Governmental bill concerning the FCA). In Finnish jurisprudence, sources of company law have even been used to interpret cooperative legislation. See, e.g., Jukka Mähönen & Seppo Villa, *Osuuskunta* 4 (2nd ed., Helsinki; Alma Talent, 2014).

¹⁸ Fici (n 12) at 13.

¹⁹ Jussila, Kalmi and Troberg (n 15) at 38.

²⁰ See, e.g., Jussila, Kalmi and Troberg (n 15) and Seppo Pöyhönen, *Omistajaoikeudet ja omistajatarvo osuuskunnissa*, 37-41 (Hämeenlinna; Talentum, 2011).

²¹ See Ville Pönkä, *Osuuskuntaoikeudellisen tutkimuksen nykytila ja tulevaisuus Suomessa* 2 Liikejuridiikka 187-195 (2017). In other countries, legal scholars have also paid little attention to cooperative law. This applies to both national and international cooperative law research. See, e.g., Fici (n 12) at 15.

seems to be improving slightly, since the number of publications on the topic has recently increased.

This article is structured in the following way. First the roots of Finnish cooperative law are briefly introduced (section 2). Then the focus shifts to the objective of cooperatives and the general principles of cooperative law, which are examined within the framework of the FCA (section 3). Here the important question is the extent to which the FCA has departed from the international cooperative tradition. Finally, section 4 summarizes the research findings and explores areas of further research.

2. A Brief Introduction to Finnish Cooperative Law

The beginning of the modern cooperative movement is universally associated with the establishment of the Rochdale Society of Equitable Pioneers in 1844.²² The society laid down principles²³ which have since been revised and updated several times, but which are essentially the same principles upon which all co-operatives operate today.²⁴ In civil law jurisdictions, cooperative legislation began to form in the late nineteenth and the early twentieth centuries. For instance, cooperative law dates back to 1867 in France, 1882 in Italy, 1889 in Germany and 1931 in Spain. In Scandinavia, Sweden was the first country to introduce a cooperative law in 1895.

In Finland the first cooperative law came into force in 1901. The law was established on the Rochdale Principles; however, it was bound firmly to the Finnish Companies Act 22/1895, i.e., gaps in cooperative legislation were filled by company law norms.²⁵ The Finnish Cooperatives Act 22/1901 (FCA 1901) consisted of just 36 sections, and even though it was quickly considered outdated in global comparisons, the

Some authors have even claimed that the ‘scientific research and knowledge of cooperative law is generally neglected and excluded from academic teaching and research. Hans-Hermann Münkner, *Worldwide Regulation of Co-operative Societies – An Overview*, 53113 Euricse Working Paper 24 (2013) <http://www.euricse.eu/wp-content/uploads/2015/03/1371044429_n2351.pdf> (accessed 23 October 2018).

²² See, e.g., Brett Fairbairn, *The Meaning of Rochdale. The Rochdale Pioneers and the Co-operative Principles*, 6 (Saskatchewan; Centre for the Study of Co-operatives, 1994).

²³ These principles were (1) open membership, (2) democratic structure (the principle of one member, one vote), (3) distribution of surplus in proportion to business conducted with the cooperative, (4) limited return on capital, (5) political and religious neutrality and (6) promotion of education.

²⁴ See, e.g., Barbara Czachorska-Jones, Jay Gary Finkelstein & Bahareh Samsami, *United States in Dante Carcogna, Antonio Fici & Hagen Henry (eds), International Handbook of Cooperative Law 761* (Berlin; Springer, 2013).

²⁵ Allan Huttunen, *Osuustoimintalain syntä ja muutokset*, 7 (Turku; Turun yliopiston oikeustieteellisen tiedekunnan julkaisu, 1990). Although the law was supplemented by the norms of company law, the lawmakers of the time believed it to be of utmost importance to pass legislation on ‘economic associations,’ since the stock company form was unsuitable for such enterprises (i.e., cooperatives). See, e.g., Aulis J Alanen, *Hannes Gebhard*, 217 (Helsinki; Yhteiskirjapaino Oy, 1964). In many other countries, the need for cooperative-specific legislation has also been established on the grounds of a similar argument. A Egger, *The Cooperative Movement and Cooperative Law*, XII International Labour Review 5 (1925).

law was amended only twice during the 50 or so years it was in force.²⁶ Finnish scholars have, however, generally agreed that the FCA 1901 greatly furthered the development of Finnish cooperatives and, in fact, the all-time peak in the number of registered cooperatives (ca 9,000) was reached in the 1950s.²⁷

The second Finnish cooperative law was passed in 1954, and it was significantly influenced by the Swedish Cooperatives Act 1951:308 and by German jurisprudence in general. The Finnish Cooperatives Act 247/1954 (FCA 1954) was totally independent from company legislation, and while initially consisting of 165 sections, it was, at the time, one of the most modern and comprehensive cooperative laws in the world: As mentioned above in section 1, even today most jurisdictions do not view cooperative law as a wholly independent body of law. The FCA 1954 was later amended a total of 20 times, with most changes occurring in the 1980s and 1990s, and eventually consisted of nearly 240 sections.²⁸

The FCA 1954 was also in force for around 50 years and was followed by the third Finnish cooperative law, which dates from 2001. The main objective of this law (1488/2001, FCA 2001) was to improve the operational and financial prerequisites of cooperatives by updating their legal framework to reflect the requirements of the modern business environment. In practice, this meant that legal provisions concerning the incorporation and administration of cooperatives were lightened, new methods for securing sufficient capitalization were introduced, and many previously mandatory rules of law were transformed into non-mandatory provisions, i.e., provisions which could be altered in the bylaws of the cooperative.²⁹ Here it is important to understand that while the FCA 1954 was built on a strict state-interventionist model to secure the interests of the welfareizing nation, in the late 1990s and early 2000s profitability, efficiency and competitiveness had emerged as key priorities in politics and law-making. This shift in the political climate, as well as the triumph of the law and economics movement,³⁰ facilitated both the non-mandatorization and the companionization of Finnish cooperative law.³¹

The lifespan of the FCA 2001 was relatively short, since the current law, i.e. the FCA, came into force at the beginning of 2014. Legislators' main objective was to further enhance the operational and financial prerequisites of cooperatives, codify certain practices that had evolved in jurisprudence and case law and further expand

²⁶ Hallituksen esitys 12/1953 osuuskuntia koskevan lainsäädännön uudistamiseksi I (Governmental bill concerning the FCA 1954).

²⁷ Hagen Henry, *Finland* in Dante Carcogna, Antonio Fici & Hagen Henry (eds), *International Handbook of Cooperative Law*, 374 (Berlin; Springer, 2013). See also Fici (n 9) at 38.

²⁸ Such factors as EU membership, significant changes in Finland's capital markets (especially liberation from a bank-centered financial system), and new tax laws were some factors behind the amendments to the FCA 1954. These numerous and extensive amendments led to an extremely fragmented law, and eventually the only possibility was to pass a wholly new cooperatives act.

²⁹ Hallituksen esitys 176/2001 osuuskuntalaiksi ja siihen liittyviksi laeiksi 1-3 (Governmental bill concerning the FCA 2001).

³⁰ Pönkä (n 13) at 24.

³¹ Seppo Pöyhönen, *Osuuskunta ja osuuskuntalaki*, 6 (3rd ed., Helsinki; Talentum, 2013).

the bylaw autonomy of cooperatives.³² Moreover, a new law was necessary because the FCA 2001 had, like its predecessor, become extremely fragmented, due to 10 amendments in only 12 years. Nevertheless, some Finnish scholars have seen the FCA as a step towards a general law for all economic associations, since the FCA was firmly established on the principles of the Finnish Companies Act 624/2006.³³ This is not only a Finnish trend, as similar steps have been taken, for instance, in Sweden, where significant amendments to the Swedish Act on Economic Associations 1987:667 (SEAA) came into force in July 2016.³⁴

The FCA consists of 28 chapters which are divided into 364 sections. The FCA covers such issues as the general principles of cooperative law, incorporation and dissolution, the rights and obligations of the members of the cooperative, administration, capitalization and asset distribution, mergers and de-mergers and sanctions. On the other hand, such issues as insolvency and bankruptcy, bookkeeping and auditing and taxation are regulated by other laws which are not cooperative specific.³⁵ The FCA governs all cooperatives registered according to Finnish law, and unlike many other countries – such as France and Italy – there are no separate laws for particular types of cooperatives.³⁶ There is little published case law regarding the FCA, although the FCA is the most important source of law for Finnish cooperatives. This lack of case law also means that the general principles of cooperative law (which are laid down in Chapter 1 of the FCA) play an important role in supplementing the numerous casuistic rules.

Based on the abovementioned, this section can be concluded with the following observations: Finnish cooperative legislation has relatively deep roots, and, during the past 120 or so years, the Finnish Cooperative Act, through its four incarnations, has matured into one of the most coherent and modern cooperative laws in Europe. Since the FCA of 1901, it has been evident that legislation plays an important role in the development of cooperatives, and today the cooperative movement is, without doubt, thriving in Finland.³⁷ Finnish cooperative law is extremely coherent; however,

³² Hallituksen esitys (n 17) at 1-2.

³³ Veikko Vahtera, *Millaisille sääntelyratkaisuille Suomen yhteisöläinsäädännön kokonaisuudistukset rakentuvat? – Esimerkkinä uusi osuuskuntalaki* 4 Defensor Legis 641 (2013).

³⁴ See, e.g., Statens offentliga utredningar 2010:90. En ny lag om ekonomiska föreningar (Governmental committee report concerning the SEAA) and Regeringens proposition 2015/16:4. Modernisering av lagen om ekonomiska föreningar (Governmental bill concerning the SEAA).

³⁵ Some cooperative law scholars, in fact, argue that elements of other laws (e.g., tax laws, competition laws and labor laws) should not be mixed with organizational cooperative legislation since this might turn cooperative law and cooperatives into political tools. See, e.g., Münkner (n 21) at 23.

³⁶ Fici (n 12) at 12.

³⁷ It is, however, an interesting statistical fact that the number of Finnish cooperatives has changed quite considerably throughout history. E.g., between the 1950s and 1970s there were ca. 9,000 operational cooperatives but their number shrank to ca. 2,000 (mainly because of mergers) in the 1980s. See Hallituksen esitys (n 17) at 9. Since then, the number of registrations has been steadily increasing, and in July 2018 there were 4,287 operative cooperatives in Finland. See <www.prh.fi/fi/kaupparekisteri/yritystenlkm/lkm.html> (accessed 23 October 2018). This is not a huge number, but it is important to remember that cooperatives function in all major branches of business, and some of them are very large, consisting of millions of members. See n 16.

the number of casuistic norms has increased constantly. For smaller cooperatives, this can be a challenge, since the more detailed and technical the law becomes, the harder it is for entrepreneurs to operate without the support of lawyers. The more substantial problems, however, relate to the lack of case law and cooperative law research,³⁸ and to companization and unequal tax treatment.³⁹ These are not only Finnish problems but challenges which seem to arise in most Western jurisdictions. However, due to the challenges of space, these issues cannot be addressed further in this paper, and thus we shall next concentrate exclusively on the topic of companization.

3. The Objectives of Cooperatives and the General Principles of Cooperative Law – Reflections on the FCA

On an international level, the cornerstones of cooperative law are the 1995 ICA Statement on the Co-operative Identity (ICA Statement),⁴⁰ the 2001 United Nations Guidelines on creating a supportive environment for the development of cooperatives (UN Guidelines)⁴¹ and the International Labor Organization Recommendation No. 193, published in 2002, concerning the promotion of cooperatives (ILO R. 193).⁴² These sources of law all aim to promote a globally shared conception of the values and principles of cooperatives, which were first introduced in the ICA Statement and thereafter officially recognized in the UN Guidelines and ILO R. 193.⁴³ ILO R. 193, whose main purpose is to maintain cooperatives as distinct legal entities, is sometimes considered the main source of ‘public international cooperative law,’⁴⁴ although in practice both the UN Guidelines and ILO R. 193 are merely expressions of ‘best

³⁸ See n 21.

³⁹ See, e.g., Fici (n 12) at 58-59 who has argued that ‘tax law should be made consistent with the organizational law of cooperatives, which means that it should reflect the specificities of cooperatives that distinguish them from other business organizations, notably pro-profit capitalistic companies.’ See also Seppo Penttilä and Veikko Vahtera, *Osuuskunta yhteisömuotona ja sen ylijäämänjaon verotuksen uudistaminen* 3 Defensor Legis 486-487 (2015), who have shown that Finland has, in fact, worsened the tax treatment of traditional cooperatives.

⁴⁰ See <<http://ica.coop/en/whats-co-op/co-operative-identity-values-principles>> (accessed 23 October 2018).

⁴¹ *Supportive Environment for Cooperatives. A Stakeholder Dialogue on Definitions, Prerequisites and Process of Creation*. Report of an Expert Group Meeting held in Ulaanbaatar, Mongolia, 15-17 May 2002 (Division for Social Policy and Development Department of Economic and Social Affairs, UN, New York 2003) Annex I.

⁴² See <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193> (accessed 23 October 2018).

⁴³ Borzaga & Galera (n 3) at 14 and Münkner (21) at 20.

⁴⁴ See, e.g., Hagen Henry, *Public International Cooperative Law* in Dante Carcogna, Antonio Fici & Hagen Henry (eds), *International Handbook of Cooperative Law*, 67 and 71 (Berlin; Springer, 2013), who argues that ILO R. 193 carries more legal weight than the recommendations of other international organizations and that ILO R. 193 is ‘legally binding.’ Henry does not, however, define what this means in practice.

practices' in drafting cooperative law.⁴⁵ In other words, they are not to be understood as model laws or common legislative frameworks such as the European Cooperative Society (SCE) regulation of 2003.⁴⁶

In the following sections 3.1-5, the extent of the companization of the FCA is tested using the ICA Statement as a benchmark.⁴⁷ The analysis is conducted in such a way that the principles of the ICA Statement (Cooperative Principles) are first introduced briefly, after which the FCA is compared to them. The structure of the analysis follows the systematics of the ICA Statement; hence, the objective of cooperatives is not assessed separately, as it is encompassed in the Cooperative Principles. Furthermore, it should be stressed that as the purpose of this article is not to explain cooperative law on a general level but to study the phenomenon of companization, the ICA Statement is not analyzed in detail. Moreover, as Hans-H. Münkner has aptly remarked, the ICA Statement is the 'smallest common denominator' for national cooperative laws, and it deliberately leaves room for interpretation.⁴⁸

3.1. *Voluntary and Open Membership*

The first Cooperative Principle, the so-called 'open door' principle, is titled 'Voluntary and Open Membership, and it states that

'[c]o-operatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.'

The legal nature of cooperative membership is one of the 'core structural characteristics'⁴⁹ of the cooperative form and an element which distinguishes cooperatives from

⁴⁵ Münkner (21) at 20.

⁴⁶ The SCE is an EU association form provided by Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society (SCE Regulation) [2003] L 207/1. Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [2003] L 207/25 supplements this statute with rules on the involvement of employees. The SCE has been described as the 'cooperative equivalent' to the European Company (SE). Antonio Fici, *The European Cooperative Society Regulation* in Dante Carcogna, Antonio Fici & Hagen Henry (eds), *International Handbook of Cooperative Law*, 116 (Berlin; Springer, 2013). Unfortunately the SCE Regulation has had only limited success, and the reasons for this have been explained briefly in Commission Report (COM) 2012 72 final on the implementation of the SCE Regulation.

⁴⁷ In most countries, the ICA's Cooperative Principles have been adhered to when drafting cooperative law but without mentioning them explicitly. There are, however, some countries (such as Indonesia, the Philippines, Singapore, and some countries of Latin America) which have made the principles part of their national legislation. Hans-H Münkner, *Ten Lectures on Cooperative Law*, 35 (2nd ed., Wien; Lit Verlag, 2016). On the other hand, in some other countries (such as Luxembourg and the Netherlands) the principles have been rather systematically ignored. Fici (n 9) at 53.

⁴⁸ Münkner (n 21) at 21. See also Henry (n 9) at 40.

⁴⁹ The concept of 'core structural characteristics' is used here in the same sense in which Henry Hansmann and Reiner Kraakman use it in their famous analysis of the business corporation. See Armour et al. (n 8) at 5-15.

companies: cooperatives are *person-based* associations, while companies are *capital-based* organizations.⁵⁰ Furthermore, it is important to remember that the ‘shares’ assigned by a cooperative differ essentially from the shares of a company.⁵¹ A cooperative share does not determine the extent of a member’s governance and capital rights; rather, it is merely a condition for membership, i.e., an ‘entrance fee.’⁵² In fact, it might be appropriate to term cooperative shares ‘compulsory capital contributions’ (or ‘membership shares’⁵³ or ‘advance payments for future services’)⁵⁴ to make a clear distinction between them and the shares of a company.⁵⁵

The voluntary nature of membership is not, on the other hand, a distinctive feature of the cooperative in comparison to companies, since neither membership of a cooperative nor company shares can be obtained without the consent of the member/potential shareholder.⁵⁶ Voluntary membership can, however, be understood in a broader sense to encompass also the freedom to withdraw from the cooperative;⁵⁷ i.e., the open door principle applies both ways – to entrance and exit. Here cooperatives differ essentially from companies, where the shareholder has no such freedom of exit in relation to her/his shares, which bind her/him as a shareholder to the company.⁵⁸

The concept of ‘open membership’ has raised some discussion as to whether cooperatives should be open to anyone who is able to use their services and willing to accept the responsibilities of membership or whether cooperatives should be open only to the extent that a cooperative is prohibited from refusing membership on, for instance, gender, social, racial, political or religious grounds. This debate is not explained in detail here, since today there seems to be a broad consensus that the exclusive purpose of the open door principle is to prevent the occurrence of artificial and unreasonable restrictions on cooperative membership, or as Antonio Fici puts it, ‘to ensure that a cooperative does not become a sort of closed club where benefits are

⁵⁰ See, e.g., Fici (n 12) at 38 and Münkner (n 47) at 91–92.

⁵¹ Ville Pönkä, *Osuuskunnan jäsenen erottamisesta* 5 Lakimies 673–674 (2016) and *The Legal Nature of Cooperative Membership* 7 Journal of Entrepreneurial and Organizational Diversity 2 (2018).

⁵² Fici (n 12) at 35–36 and 38.

⁵³ Henry (n 1) at 38. Furthermore, Münkner calls cooperative shares ‘classical shares’. Münkner (n 9) at 81.

⁵⁴ Franz C Helm, *The Economics of Co-operative Enterprise*, 10 (London; University of London Press, 1968).

⁵⁵ In countries like Finland and Sweden, it has also been acknowledged that membership of a cooperative and holding shares in a company differ essentially from one another. Then again, membership of a cooperative and membership of an association have been recognized as rather similar legal constructions, although cooperatives are business organizations (like companies) and associations are non-profit (ideal) consortiums. In fact, in Sweden cooperatives are called economic associations (Swe. ekonomiska föreningar), not cooperatives (Swe. andelslag). See Curt Olsson, *Osuuskuntaoikeus*, 67 (3rd ed., Helsinki; Suomen Lakimiesliiton kustannus, 1982) and Pönkä (n 51) at 674.

⁵⁶ I.e., no one can be forced to be a member of a cooperative or to accept shares in a company.

⁵⁷ Münkner (n 9) at 97 and (n 47) at 94.

⁵⁸ The shares of a company cannot be abandoned or destroyed by their holder, which means that the shareholder is bound to her/his shares until someone either takes (purchases, inherits, redeems etc.) them or the company ceases to exist.

shared only among current members.⁵⁹ In light of the open door principle, it is also necessary that member exclusions are treated as exceptional measures⁶⁰ and that they are never based on such unjust factors as those listed above.

In Finland – and, among others, Sweden – understanding of the legal nature of cooperative membership is similar to that of international cooperative law.⁶¹ Therefore, the provisions of the FCA are generally in harmony with the open door principle. First, in Chapter 1, section 3(1) of the FCA, the cooperative is defined as an organization whose membership, shares and share capital have not been determined in advance. This rule promotes the social function of the cooperative by making it an entity whose benefits can be shared by the largest possible number of persons. Companies, on the other hand – even those which are considered ‘open’ or ‘public’ – are not open in the same sense as cooperatives.⁶²

Later in Chapter 3 of the FCA, specific rules on the application and beginning of membership, as well as withdrawal and exclusion from the cooperative, are laid down. According to these rules, the cooperative has wide discretion over membership selection, as no person has an universal right (or obligation) to become a member of a cooperative. Cooperatives may not discriminate between potential members on unjust personal grounds,⁶³ but even so, a cooperative cannot be forced to accept somebody as a member.⁶⁴ As a counterweight to the wide discretion in membership selection, members have the right to withdraw from the cooperative whenever they please and without any specific reason. The FCA provides only one exception to this rule, as it may be stipulated in the cooperative’s bylaws that the right of a member to resign may be suspended until the lapse of a fixed period, which may be no longer than three years from the beginning of the membership. Furthermore, the FCA limits the cooperative’s right to exclude members in instances where the member has neglected an obligation ensuing from membership. Other grounds for exclusion can, however, be included in the bylaws of the cooperative.

In light of the above, the FCA seems to conform quite precisely to the open door principle. Nevertheless, some signs of companization do exist. First, the FCA currently permits cooperatives to have just one member.⁶⁵ In cooperative law theory (and unlike company law theory, where the shareholder is conceived as an anonymous investor), this is considered a somewhat problematic deviation from the ideal of the

⁵⁹ Fici (n 12) at 38, Henry (n 1) at 55 and 72 and Münkner (n 9) at 97-98, 105 and (n 47) at 93.

⁶⁰ Henry (n 1) at 75.

⁶¹ Pönkä (n 51) at 672-675.

⁶² Fici (n 12) at 56-57.

⁶³ The non-discrimination rule can be derived from Sec. 6(2) of the Constitution of Finland 731/1999, but it is not stated explicitly in the FCA.

⁶⁴ However, for cooperatives which produce consumer necessities, the possibilities to reject new members are limited to quite exceptional circumstances. See, e.g., Olsson (n 55) at 63-65, Pönkä (n 51) at 674, Pöyhönen (n 31) at 63 and Marjos Rapola, *Kysymys pääsemisestä osuuskunnan jäseneksi de lege ferenda* 2 Lakimies 492 (1952).

⁶⁵ See Hallituksen esitys (n 17) at 20-21, where the one-member requirement is explained by the fact that the previous three-member requirement made the incorporation of a cooperative unreasonably complicated and in practice the requirement was easily circumvented.

cooperative as a platform for member cooperation (and not asset partitioning), since it is obvious that in single member cooperatives no actual cooperation can exist.⁶⁶ That said, it is not self-evident that cooperative law should necessitate a certain minimum number of members. These kinds of requirements tend to be based on artificial assumptions of, e.g., the number of persons required for actual cooperation to exist, and even though a cooperative is established by one person, it does not mean that it will remain as a 'one-man society.' Currently, European countries seem to require an average of three members, with Finland and the Netherlands appearing as the only single-member jurisdictions.⁶⁷

Second, the FCA has introduced investor shares (Fi. osake), which differ essentially from traditional cooperative shares (Fi. osuus).⁶⁸ These investor shares resemble the shares of a company,⁶⁹ with the exception that their holder's governance and financial rights depend on what has been stipulated in the bylaws of the cooperative. The purpose of this new instrument is to enhance the capitalization possibilities of cooperatives, and the FCA even permits the listing of both investor and traditional shares.⁷⁰ Although investor shares do not, as such, transform cooperatives into capital-based companies, their introduction is a clear sign of the companization of cooperative law.⁷¹ Moreover, bylaw autonomy regarding the governance and financial rights of these instruments is so broad that it is even possible to establish a cooperative where capital contributions play a more significant *de facto* role than member participation. In cooperative law theory, such cooperatives are known as 'dividend cooperatives' or 'capital cooperatives.'⁷²

⁶⁶ Fici (n 12) at 25 fn 84 and 54.

⁶⁷ For the Netherlands, see Ger JH van der Sangen, *Netherlands* in Dante Carcogna, Antonio Fici & Hagen Henry (eds), *International Handbook of Cooperative Law*, 548-549 (Berlin; Springer, 2013).

⁶⁸ In the English language there are no concepts which could be used to make a clear distinction between the two different types of shares recognized by the FCA. Some researchers have, however, used the term 'investor share' in a similar context. See Fabio R Chaddad and Michael L Cook, *Understanding New Cooperative Models: As Ownership-Control Rights Typology* 26 *Review of Agricultural Economics* 3, 357-358.

⁶⁹ Some Finnish authors, however, insist that the investor shares of a cooperative and the shares of a company are significantly different instruments. See Raimo Immonen, Jaakko Ossa and Seppo Villa, *Osuuskunnan pääoman hallinta. Osuuskunta-, kirjanpito- ja verolainsäädännön rajapinta muodostettaessa ja järjestettäessä osuuskunnan omaa pääomaa sekä jaettaessa osuuskunnan varoja*, 22-23 (Helsinki; Alma Talent, 2015).

⁷⁰ According to Ch. 5, sec. 2 of the FCA, cooperatives which have listed shares are called 'listed cooperatives.' No cooperative has yet been listed in Finland, but in other countries cooperative listings have occurred. See, e.g., OF van Bekkum and J Bijman, *Innovations in Cooperative Ownership: Converted and Hybrid Listed Cooperatives* in S Rajagoplan, *Cooperatives in 21st Century. The Road Ahead*, 34-56 (Hyderabad, India; The ICFAI University Press, 2007).

⁷¹ Some scholars, however, see such investor shares as a desirable instruments. See, e.g., Cliff, Mills, *Past, Present and Future* in Rob Harrison, *People Over Capital. The Co-operative Alternative to Capitalism*, 54 (Oxford; New Internationalist Publications, 2013): 'The problem of the co-operative world today is that it does not have something comparable to the company share, which it can hold up and say – use this for your savings, and help to secure an alternative future.'

⁷² Münkner (n 47) at 14.

3.2. *Democratic Member Control*

According to the second Cooperative Principle,

‘[c]o-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member, one vote) and co-operatives at other levels are also organised in a democratic manner.’

In cooperative law theory, this rule is often phrased simply as the ‘one member, one vote’ principle. It means that all members of the cooperative should have just one vote at the general meeting (or other similar organ); however, national legislators have adopted many deviations from this democratic rule. Nevertheless, some jurisdictions strictly interpret the one member, one vote principle, and, in order to avoid the concentration of voting rights in larger families, some laws even allow just one person per household to hold membership of a cooperative.⁷³ The modern trend, however, seems to be the exact opposite, and, as mentioned, national laws often grant cooperatives some leeway regarding the principle.⁷⁴ For instance, in the U.S. many states permit a system where every member has at least one vote at the general meeting and extra votes are added in proportion to a member’s equity or volume of patronage.⁷⁵ Furthermore, according to Article 59(2) of the SCE Regulation, a cooperative’s bylaws may ‘provide for a member to have a number of votes determined by his/her participation in the cooperative activity other than by way of capital contribution.’

In the second Cooperative Principle deviations from the one member, one vote principle are in primary acceptable as long as certain ‘safeguards’ are retained, i.e., normative precautions to prevent cooperatives from transforming into non-democratic organizations.⁷⁶ Here, the cooperative movement has diverged from Charles Gide’s conception of the cooperative as a ‘miniature republic’ where the equality of its members is ensured by the ‘one man one vote’ maxim.⁷⁷ One must, however, remember that sometimes it is crucial for the existence and development of cooperatives that their governance structures can be, at least to some extent, tailored to meet the

⁷³ Johnston Birchall, *People-Centered Businesses. Co-operatives, Mutuals and the Idea of Membership*, 197 (Houndmills; Palgrave Macmillan, 2011).

⁷⁴ Fici (n 12) at 50 and Münkner (n 9) at 118 and (n 47) at 37.

⁷⁵ Bruce J Reynolds, *The One Member-One Vote Rule in Cooperatives* 15 *Journal of Cooperatives* 48-9 (2000). Reynolds has also analyzed thoroughly the positive and negative effects of the rule of proportional voting. In brief, his analysis shows that although some cooperative theorists object to the idea of proportional voting, all seem to agree that cooperatives should have the freedom to decide whether or not to deviate from the one member, one vote principle.

⁷⁶ Fici (n 12) at 51 and Münkner (n 9) at 118 and (n 47) at 37.

⁷⁷ Charles Gide, *Consumers’ Co-operative Societies*, 100 [translated from the French by the staff of the Co-operative Reference Library, Dublin] (New York; Alfred A Knopf, 1922).

demands and expectations of the most significant members and potential investors.⁷⁸ Furthermore, innovations such as proportional voting can even support the purpose of the cooperative as a society where cooperation is defined by member participation.⁷⁹

The one member, one vote principle has also been acknowledged by Finnish legislators as a central rule: According to Chapter 5, section 13 of the FCA, at the general meeting one member has one vote on all matters to be considered. It may, however, be stipulated in the bylaws that members have a differentiated number of votes; nevertheless, the number of votes held by one member may not exceed twenty times the number of votes held by another member. This 20:1 vote restriction does not concern second-level cooperatives whose bylaws stipulate that the majority of members must be cooperatives or other legal persons or that one of the members must be a public entity. Such cooperatives basically have unlimited bylaw autonomy regarding the number of votes their members possess.

Considering how differentiated the voting rights of members can be, the FCA seems to permit – and without any specific reason⁸⁰ – rather extensive deviation from the one member, one vote principle compared to other European countries.⁸¹ Even so, the FCA is not in conflict with the second Cooperative Principle, since safeguarded deviations, as mentioned, are generally acceptable. What makes the FCA somewhat problematic, however, is the fact that the number of votes a member possesses can be determined by her or his capital contributions.⁸² In fact, it is even stated in the Governmental bill on the FCA 2001 that cooperatives should be allowed to adopt similar governance structures to those of companies, since this enhances their capitalization possibilities. It has also been argued that deviations from the one member, one vote principle are crucial for cooperatives whose business operations (such as health care and architectural services) necessitate extensive investment.⁸³

⁷⁸ The one member, one vote principle seems particularly ineffective when cooperative members do not form a homogenous interest group, or, as Holmström puts it, in such cooperatives the potential value of the vote is often lost in member quarrels and indecisiveness. Holmström (n 4) at 498.

⁷⁹ See similarly Ivan V Emelianoff, *Economic Theory of Cooperation: Economic Structure of Cooperative Organizations*, 195 (University of California, Center for Cooperatives, 1995) and Fici (n 12) at 50. See differently Münkner (n 9) at 112.

⁸⁰ It is also worth noting that the FCA does not restrict the decision-making situations where multiple voting rights may be exercised. In cooperative law theory, Henry has found this problematic, since he believes that cooperative law should prohibit the use of plural votes in ‘important matters.’ See Henry (n 1) at 85. Here one must, however, remember that the general meeting is the highest decision-making organ of the cooperative, and one can argue that all the matters it handles are important. Furthermore, distinguishing important matters from trivial ones can be problematic *per se*.

⁸¹ See Carmen Quintana Cocolina et al., *The Power of Cooperation – Cooperatives Europe Key Figures 2015* (Cooperatives Europe, 2016).

⁸² See Henry (n 1) at 85: ‘In no case ... may plural voting rights be granted on the basis of the amount of financial contributions by a member.’ and Fici (n 12) at 51: ‘[V]oting power in a cooperative could never be based on capital contributions by members, as normally happens in companies.’

⁸³ Hallituksen esitys (n 29) at 51. The same justifications have been repeated in the Governmental bill concerning the current FCA. Furthermore, it has been claimed that deviations from the one member, one vote principle are necessary for cooperatives to be able to tailor incentives for their employees and managers. See Hallituksen esitys (n 17) at 57.

Finally, it is necessary to emphasize that, according to Chapter 4, section 3(1) of the FCA, the shares of a cooperative – traditional or investor – do not give their holder the right to vote at the general meeting. This means that only members have voting rights, even though the number of a member's votes may be determined by the number of shares she/he possesses, i.e., by the amount of capital contributed.⁸⁴ In light of the second Cooperative Principle, it is essential that non-member shareholders (and in general all non-member parties) are unable to vote at the general meeting, since cooperatives are member, not investor, controlled entities.⁸⁵ On the other hand, the second Cooperative Principle also states that cooperatives are *democratic* organizations, which makes it necessary to assess how far national laws should allow cooperatives to depart from the requirement of *member equality* in decision-making. This is something which would require thorough research, and at least the Finnish system – where in first-level cooperatives one member can have twenty times the number of votes of another member and without any specific reason – has simply been copied from company law. Therefore, the question, which Finnish legislators have unfortunately ignored, is where the numbers (20:1 votes) come from and whether they allow cooperatives to diverge too far from *Gide's* ideal, allowing them to transform into non-democratic, company-like organizations.⁸⁶

3.3. *Members' Economic Participation*

According to the third Cooperative Principle,

'[m]embers contribute equitably to, and democratically control, the capital of their co-operative. At least part of that capital is usually the common property of the co-operative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.'

⁸⁴ Immonen, Ossa and Villa (n 69) at 22 and Mähönen and Villa (n 17) at 61-62.

⁸⁵ This rule is also supported by the fourth Cooperative Principle, according to which, cooperatives are autonomous and independent organizations controlled by their members. See section 3.4. In the Netherlands legislators have, however, departed even from this rule and allowed voting rights to be introduced for non-members, although with certain limitations. See van der Sangen (n 67) at 554-555. See also Henry (n 1) at 86, who has argued that if the law grants voting rights to non-members, it must be ensured that they cannot outweigh 'regular' members at the general meeting.

⁸⁶ Similar issues have raised concerns amongst company law scholars. The idea behind the one share, one vote principle is that the capital contributions of the shareholders should reflect the volume of their governance rights; hence some argue that no-vote and multiple-vote shares should be forbidden, as such instruments contradict this theory. See, e.g., Mike Burkart and Samuel Lee, *One Share – One Vote: the Theory* 12 Rev Financ 1 (2008).

It is from this principle that the two core characteristics of the cooperative's economic structure are derived. First, capital contribution is a precondition for cooperative membership, and 'entrance fees' form an essential part of a cooperative's capital.⁸⁷ This capital can vary, as can the number of members, and national laws rarely provide for the minimum capital requirements of cooperatives.⁸⁸ As mentioned above in section 3.1, capital contributions constitute an economic bond between the cooperative and its members, and this bond is structured as a (traditional) share. Nevertheless, these shares do not possess the same structural characteristics as company shares, and, in particular, the financial rights of a member/shareholder of a cooperative are far more restricted than the financial rights of a company shareholder.⁸⁹

Second, the third Cooperative Principle suggests that cooperative surplus should be used mainly to support the mission of the cooperative as an organization promoting the aggregate welfare of its members as consumers, providers and/or workers.⁹⁰ It has been even argued that in order to show that it has acted effectively in favor of its members, a cooperative should not generate any divisible profits ('returns').⁹¹ This is, of course, only a theory, but it demonstrates that the main purpose of the cooperative should not be to maximize returns. However, as mentioned earlier in section 3.1, so-called dividend (or capital) cooperatives have arisen in recent years, and these organizations have abandoned the classical cooperative model in favor of striving for high return on capital investment.⁹²

According to Chapter 9, section 1 of the FCA, a member of a cooperative must take at least one traditional share.⁹³ In addition, the cooperative's bylaws can stipulate that members may/must take additional traditional shares and/or investor shares and that both traditional and investor shares can also be given to non-members. Furthermore, according to Chapter 9, section 2 of the FCA, cooperatives may issue – even without the support of their bylaws – new traditional and investor shares to both members and non-members. The FCA provides no minimum capital requirements for cooperatives; however, according to Chapter 16, section 7, a cooperative must have

⁸⁷ The question of whether the capital contribution is regarded as a precondition for membership or a consequence of acquisition of membership is irrelevant (it is merely a 'chicken-and-egg' dilemma), but what is important is to understand that in cooperative law theory membership and minimum capital contribution are considered inseparable. Münkner (n 47) at 162.

⁸⁸ Fici (n 12) at 36-37. The SCE makes a noteworthy exception to the abovementioned, since according to Art. 3(2) of the SCE Regulation, the subscribed cooperative capital shall be no less than 30,000 euros.

⁸⁹ E.g. Seppo Pöyhönen argued in his doctoral thesis that the financial rights of the members of Finnish cooperatives are relatively weak and that the economic interests of cooperatives and their members are asymmetric. See Pöyhönen (n 20) at 351-353.

⁹⁰ Fici (n 12) at 39.

⁹¹ *Ibid.*

⁹² Münkner (n 47) at 13-14.

⁹³ Although all the traditional shares of a cooperative are similar, if not stipulated otherwise in the bylaws, some Finnish authors distinguish traditional shares which must be taken when joining the cooperative (Fi. perusosuus) from traditional shares given later for members and/or non-members. See, e.g., Pöyhönen (n 31) at 236. In practice, such systematizations have only academic value.

a reserve fund where five percent of the surplus from the financial year shall be credited. When calculating the surplus, possible losses from the preceding financial years may be taken into account, and the reserve fund must be augmented up to 2,500 euros.

The sections summarized above demonstrate that although the FCA is very permissive regarding capitalization methods, it is, nevertheless, in harmony with the third Cooperative Principle: It emphasizes the centrality of members' control of the organization and, as explained earlier in section 3.2, non-member shareholders cannot have voting rights in a Finnish cooperative. In fact, it is even possible to argue that the sources of cooperative capital are irrelevant as long as the organization remains under its members' democratic control and independent of external influences.⁹⁴ It must, however, be noted that in practice the strict requirement of member control makes cooperative shares rather unattractive to equity investors, who often demand control rights in the target firm. Currently there are no listed cooperatives registered under Finnish law.⁹⁵

On the other hand, legal restrictions on surplus distribution are essential for securing cooperative identity.⁹⁶ Since the purpose of the cooperative is to promote the aggregate welfare of its members as consumers, providers and/or workers, not to maximize returns, it is crucial that cooperative surplus is used primarily to increase the direct and/or indirect value of cooperative membership. This principle is adopted as the main rule in the FCA, and, according to Chapter 16, section 5, cooperative surplus may be distributed to the members only if this is explicitly permitted by the bylaws. Furthermore, the Governmental bill on the FCA emphasized that the primary use of surpluses should be investments which aim to ensure the cooperative's long-term provision of comprehensive, high-quality services.⁹⁷

Furthermore, it may be stipulated in the cooperative's bylaws that the sole purpose of the cooperative is to generate profits for its shareholders, which means that a Finnish cooperative can operate like a *de facto* company.⁹⁸ This possibility has raised some concerns amongst legal scholars, since bylaw autonomy regarding the purpose of the

⁹⁴ See, e.g., Fici (n 12) at 38, who argues that 'cooperative capital does not seem to play any role other than that of providing the entity with financial means for conducting its business and fulfilling its objectives.' See similarly Münkner (n 9) at 142. Cooperative autonomy and independence is discussed later in section 3.4.

⁹⁵ See n 70. See also Münkner (n 47) at 160-161, who has analyzed the structural weaknesses of cooperatives in the field of financing.

⁹⁶ See similarly Fici (n 9) at 59, who also points out that in many European countries surplus distribution is not covered by mandatory rules but entrusted entirely to cooperative bylaws.

⁹⁷ Hallituksen esitys (n 17) at 105.

⁹⁸ Pönkä (n 51) at 672 and Vahtera (n 33) at 635. See also Hallituksen esitys (n 17) at 109. E.g. in Germany this would lead to the cooperative being dissolved *ex officio*. Münkner (n 47) at 75. On the other hand, in Luxembourg, for example, the situation seems to be just the opposite. There cooperatives can be organized as 'sociétés anonymes,' i.e., public companies. Yoanna Staechele-Stefanova, *The Luxembourg Cooperative Company Organized as a Public Limited Liability Company (société coopérative organisée comme une société anonyme «CoopSA»)* 2 ACE (Comptabilité, fiscalité, audit, droit des affaires au Luxembourg) 3 (2014).

cooperative may compromise its cooperative identity⁹⁹ and even encourage entrepreneurs to choose the cooperative form for unintended reasons.¹⁰⁰ Furthermore, it is important to assess whether there is an actual need for cooperatives to discard the single most important element which distinguishes them from companies. Currently at least, there are no signs of general interest among Finnish cooperatives in maximizing shareholder value, and there is even some empirical evidence that paying little or no returns is largely the result of cooperative choice rather than legal constraints.¹⁰¹

3.4. *Autonomy and Independence*

The fourth Cooperative Principle is called ‘Autonomy and Independence,’ and it states that

‘[c]o-operatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.’

This principle complements, in particular, the second Cooperative Principle (‘Democratic Member Control’) by emphasizing that cooperatives should remain independent from external influences to avoid either *de jure* or *de facto* control by outsiders such as public entities or investors.¹⁰² This means that both national lawmakers and cooperatives themselves must ensure that cooperative autonomy and member control are not restricted beyond a certain threshold. The extent to which the state should be allowed to interfere with the internal decision-making of cooperatives and the degree to which cooperatives should be allowed to delegate their decision-making powers to non-member parties is a matter of debate which cannot be addressed here further.¹⁰³ Nevertheless, some important observations can be made.

First, the fourth Cooperative Principle does not prohibit delegated management with a board structure as long as the general meeting (or ‘assembly’) of the members remains the supreme authority of the cooperative, being in charge of all fundamental

⁹⁹ See, e.g., Gábor G Szabó, ‘Co-operative Identity’ – *A Theoretical Concept for Dynamic Analysis of Practical Co-operation: The Dutch Case* (2005) Paper prepared for presentation at the XIth International Congress of the EAAE 7-8, who has portrayed the consequences of cooperatives losing their identity. See also Henry (n 9), who has explained why we should protect cooperative identity through law.

¹⁰⁰ Such reasons include unfounded tax benefits and the absence of minimum capital requirements. Vahtera (n 33) at 642.

¹⁰¹ Jeffrey S Royer, *Cooperative Principles and Equity Financing: A Critical Discussion* 7 *Journal of Agricultural Cooperation* 96 (1992).

¹⁰² See also Fici (n 9) at 49, who argues that the fourth Cooperative Principle ‘strengthens the effects’ of the second principle.

¹⁰³ See also Fici (n 12) at 53, who emphasizes that, in general, the extent to which ownership and control of a cooperative must be linked is unclear. See also Münkner (n 47) at 42, who notes that in industrialized countries – meaning non-socialist countries – the relationship between the state and cooperatives is regulated only to a very limited extent in cooperative-specific legislation.

decisions, including the election of board members.¹⁰⁴ In international cooperative law research, some debate has arisen on whether some or all board members should also be members of the cooperative or representatives of its different interest groups.¹⁰⁵ This is a matter where national lawmakers have wide discretion, but in general the governance structures of cooperatives seem to vary little between jurisdictions.¹⁰⁶ In some countries, such as Finland, the governance structures of cooperatives and companies are virtually identical, but this cannot be considered a sign of companization, since such formalistic similarities do not change the fact that cooperatives are member-controlled organizations.¹⁰⁷

Another interesting question regarding the fourth Cooperative Principle is whether voting agreements between cooperative members and outsiders are legally enforceable. This question is connected with the topic of companization, since, in company law, shareholders' agreements, voting agreements and other control-enhancement mechanisms (CEMs) are generally considered legally binding, whereas, in cooperative law theory, all arrangements and instruments directly or indirectly affecting the control of the cooperative are often regarded as null and void.¹⁰⁸ This means that agreements between members of a cooperative on how they shall later vote at the general meeting and agreements where a member gives a non-member party (e.g., an investor) the right to decide how she/he shall vote are not legally enforceable.¹⁰⁹ Considering the personal nature of the membership of a cooperative and the fact that national cooperative laws – including the FCA – often restrict the use of proxies, it is easy to agree with the prevailing international doctrine: As Münkner puts it, the right to vote is a 'personal' right,¹¹⁰ a right which cannot be passed on to another person. In Finland, it also seems unlikely that voting agreements in the cooperative context are legally enforceable, although this interpretation cannot be directly derived from the wording of the FCA.¹¹¹

¹⁰⁴ Fici (n 12) at 53.

¹⁰⁵ See, e.g., Fici (n 9) at 49 and (n 12) at 53-4. In general, the trend seems for cooperatives to be managed by non-professional members who lack business experience. Banks and other potential creditors are aware of this problem and are therefore unwilling to finance cooperatives without additional safeguards. Often this means that members must give personal guarantees for business loans, but what is interesting is that some countries require by law that cooperative bylaws provide for additional liability for their members (limited or unlimited) for the cooperative's debts. See Münkner (n 47) at 167. See also Charles Gould, *Co-operatives: The Shape of Things to Come* in Jonathan Michie, Joseph R Blasi & Carlo Borzaga (eds), *The Oxford Handbook of Mutual, Co-operative and Co-owned Business*, 603 (New York; OUP, 2017), who states that cooperatives are starting to prefer 'professional managers.'

¹⁰⁶ See, e.g., Cocolina et al. (n 81).

¹⁰⁷ It has been even argued that it is in the interests of the members of the cooperative to organize its governance structure in a 'strictly businesslike' manner. Münkner (n 47) at 125.

¹⁰⁸ See, e.g., Fici (n 12) at 54. See also Fici (n 9) at 49.

¹⁰⁹ However, in the case *Akasa Holdings, LLC v. Sweet* 2014 NY Slip Op 01822, a voting agreement between 'tenant-shareholders' was considered legally binding.

¹¹⁰ Münkner (n 47) at 99.

¹¹¹ This question has not been assessed by Finnish courts or legal scholars.

3.5. Other Cooperative Principles

The first four Cooperative Principles, which have been introduced above, offer national lawmakers concrete guidelines on how to draft cooperative law. These principles deal with issues which require legislative measures to ensure that the identity of the cooperative form is maintained and preserved. The last three Cooperative Principles (principles five, six and seven), on the other hand, focus on the *cooperative movement*, i.e., they deal with questions of how people (both cooperative insiders and outsiders) can be made more aware of the nature and benefits of the cooperative form (the fifth principle) and how cooperatives should operate to best serve the interests of their members and the community as a whole (the sixth and seventh principles).

The fifth, sixth and seventh Cooperative Principles read as follows:

‘Co-operatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their co-operatives. They inform the general public – particularly young people and opinion leaders – about the nature and benefits of co-operation [‘Education, Training and Information’].’

‘Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures [‘Co-operation Amongst Co-operatives’].’

‘Co-operatives work for the sustainable development of their communities through policies approved by their members [‘Concern for Community’].’

These principles have rarely led to legislative measures on a national level, and even in those jurisdictions where the Cooperative Principles have been enshrined in law, Principles five, six and seven are often treated as soft law or as recommendations on good practices rather than requirements for compulsory action.¹¹² Furthermore, since the principles on education, training and information, cooperation amongst cooperatives, and concern for community focus on the cooperative movement (not on cooperative identity), they do not cover companization-sensitive issues, in contrast to the first four principles. Therefore, the last three Cooperative Principles are not discussed further here; however, two general observations should nevertheless be made.

First, cooperation amongst cooperatives plays a very important role in maintaining and preserving the cooperative identity because such cooperation – and especially cooperation on an international level – can serve as a counterweight to the trend toward companization. In jurisprudence Fici, for example, has argued that the current

¹¹² In Finland, Cooperative Principles five, six and seven have no references in the law. This does not, of course, mean that Finnish cooperatives do not follow them. As for cooperation amongst cooperatives, Finnish cooperatives have, e.g., a competent and active service organization, the Pellervo Society (see <<http://pellervo.fi/english/>>, accessed 23 October 2018), which is mentioned above in section 1.

cooperative movement is ‘nation-centered,’¹¹³ which consequently means that the companionization of cooperative law stems from the decisions of national lawmakers. Fici has also revealed many differences in the way national legislators understand cooperative identity, and today there unfortunately seem to be several cooperative laws whose compliance with Cooperative Principles is highly debatable.¹¹⁴ In order to prevent cooperative societies from transforming into cooperative companies, it is essential that the true nature of cooperative identity is universally understood, and the only way to attain such understanding is through international cooperation. Furthermore, if there is no genuine cooperation amongst cooperatives, the cooperative movement will lack effective influence over national lawmakers and transnational communities like the EU.¹¹⁵

Second, the seventh Cooperative Principle regarding the social function of cooperatives is somewhat misleading, since it might give the impression that cooperatives are non-profit organizations aiming to promote the interests of the community in general. There are, of course, cooperatives which have adopted such a function,¹¹⁶ as well as so-called ‘hybrids’ which have both commercial and non-commercial ambitions.¹¹⁷ Nevertheless, the primary purpose of the cooperative is to promote the welfare of its members; i.e., the cooperative is a member-oriented business organization, not a social enterprise.¹¹⁸ Here cooperatives do not, in fact, radically differ from companies, and *Hansmann* has even argued that the conventional investor-owned company is nothing more than a special type of producer cooperative.¹¹⁹ The reason for keeping this in mind is that cooperatives and companies are *alternatives* to one another; thus, identifying the cooperative as a non-profit organization might decrease its attractiveness to entrepreneurs. Understanding the cooperative as an alternative to the company also encompasses the idea that the company form is only one type of ‘vehicle’ for business operations,¹²⁰ thereby negating the rationale for transforming cooperatives into companies.

¹¹³ Fici (n 9) at 42.

¹¹⁴ Fici (n 9).

¹¹⁵ Furthermore, internationally oriented legal scholars tend to avoid nation-centered topics; hence, the international cooperation of cooperatives can also attract the attention of the academic community.

¹¹⁶ Cooperatives which aim to promote the interests of the community are known as ‘social cooperatives.’ Antonio Fici, *Recognition and Legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective* 27 *European Business Law Review* 659-662 (2016) and Guilia Galera, *Social and Solidarity Co-operatives – An International Perspective* in Jonathan Michie, Joseph R Blasi & Carlo Borzaga (eds), *The Oxford Handbook of Mutual, Co-operative and Co-owned Business* (New York; OUP, 2017).

¹¹⁷ See, e.g., Münkner (n 47) at 13-14.

¹¹⁸ See similarly Antonio Fici, *The Essential Role of Co-operative Law and Some Related Issues* in Jonathan Michie, Joseph R Blasi & Carlo Borzaga (eds), *The Oxford Handbook of Mutual, Co-operative and Co-owned Business*, 540-541 (New York; OUP, 2017).

¹¹⁹ Henry Hansmann, *The Ownership of Enterprise*, 12 (Cambridge, Massachusetts; London, England; The Belknap Press of HUP, 1996). See also Henry Hansmann, *All Firms are Cooperatives – and so are Governments* 2 *Journal of Entrepreneurial and Organizational Diversity* 1 (2013).

¹²⁰ Or as Frank H Easterbrook and Daniel R Fischel put it ‘[t]he corporation is a financing device

4. Conclusions

The findings of this article show that the companization of cooperative law is not only a theoretical phenomenon; rather, there are also concrete signs of national cooperative laws adopting elements of company law. This trend towards companization seems to stem from globalization and the lack of a universal understanding of the true nature of cooperative identity. Companization is also facilitated by the unfortunate fact that several countries are failing to follow the ICA's Cooperative Principles,¹²¹ which is partly the fault of the principles themselves: They are somewhat vague, partially outdated and quite open to interpretation.¹²² Furthermore, it is unclear whether the Cooperative Principles truly support and complement one another or whether some intrinsic conflict exists within cooperative law doctrine that is actually facilitating companization.¹²³ On the other hand, one must also question the efficacy of pursuing more precise and comprehensive principles which would simultaneously suit the needs of cooperatives in general. Might there be, paradoxically, a risk that such rules would narrow the possibilities for utilizing the cooperative form as an alternative to the company form? Here, one must remember that a huge variety of cooperatives operate in nearly all imaginable branches of business, and it could even be argued that flexibility (i.e., openness to interpretation) is a strength rather than a weakness of the Cooperative Principles.

As mentioned in section 1, the FCA offers an interesting framework for the analysis of companization, and as illustrated in sections 3.1-5, Finnish cooperative law has been consciously brought closer to company legislation. By comparing the FCA to international cooperative law theory – more precisely the ICA's Cooperative Principles – four points of concern regarding companization seem to emerge:

- (1) First, according to the FCA, it is possible for a cooperative to have just one member, which contradicts the ideal of the cooperative as a platform for member cooperation.¹²⁴

and is not otherwise distinctive'. See Frank H Easterbrook & Daniel R Fischel, *The Corporate Contract* 1416 Colum. L. Rev. 1425 (1989).

¹²¹ See especially Cocolina et al. (n 81).

¹²² See similarly Fici (n 9). As a reaction to the criticism directed at the Cooperative Principles the ICA published so-called guidance notes in 2015 that explain how the principles should be applied in practice. See <<https://ica.coop/en/blueprint-themes/identity/guidancenotes>> (accessed 23 October 2018). Furthermore, the Study Group on European Cooperative Law (SGECOL) was established in 2011 in Trento, Italy to draft Principles of European Cooperative Law (PECOL). In September 2017, the SGECOL finally published the *Principles of European Cooperative Law: Principles, Commentaries and National Reports*, written by Gemma Fajardo-García, Fici, Henry, David Hiez, Deolinda A Meira, Münker and Ian Snaith.

¹²³ E.g., the strict one member, one vote requirement can shift control of the organization from the members to the directors – especially in cooperatives with dispersed and heterogeneous ownership structures. In fact, Pöyhönen has recognized some signs of so-called managerial empire building within large Finnish cooperatives. Pöyhönen (n 20) at 135.

¹²⁴ See section 3.1.

- (2) Second, the FCA has introduced so-called investor shares, which resemble the shares of a company. Although such instruments do not, as such, transform cooperatives into capital-based companies, their introduction is a clear sign of the companization of cooperative law.¹²⁵
- (3) Furthermore, the FCA allows somewhat extensive deviations from the one member, one vote principle, which contradicts the ideal of the cooperative as a democratic organization.¹²⁶
- (4) Finally, the FCA permits virtually unlimited bylaw autonomy regarding the purpose of the cooperative, and it may even be stipulated in the bylaws that the purpose of the cooperative is to generate profits for its shareholders. Hence, a Finnish cooperative can operate like a *de facto* company.¹²⁷

Although these conclusions are based on Finnish law, similar signs of companization can be found in other countries, including some EU member states. To fully understand the extent and consequences of the companization of cooperative law, national reflections on the topic are essential. Unfortunately, country-specific research data cannot be gathered without the support of the local academic community, since understanding companization requires in-depth knowledge of national legal doctrines, and observations regarding foreign law often result in misunderstandings and superficial findings.¹²⁸ The future development of companization studies also requires mutual understanding of how companization should be measured and whether companization is, after all, a phenomenon worth fighting against or rather an inevitable, even somewhat positive, outcome of globalization.¹²⁹

¹²⁵ See section 3.1.

¹²⁶ See section 3.2.

¹²⁷ See section 3.3.

¹²⁸ See similarly Fici (n 9) at 41, who also notes that in Europe alone there are at least six formally different models of cooperative legislation, which makes it even more difficult for a researcher to grasp foreign cooperative law.

¹²⁹ Furthermore, it should be critically assessed are the justifications for companization outdated as Henry has claimed. Henry (n 9) at 46.